

Biological Services Program

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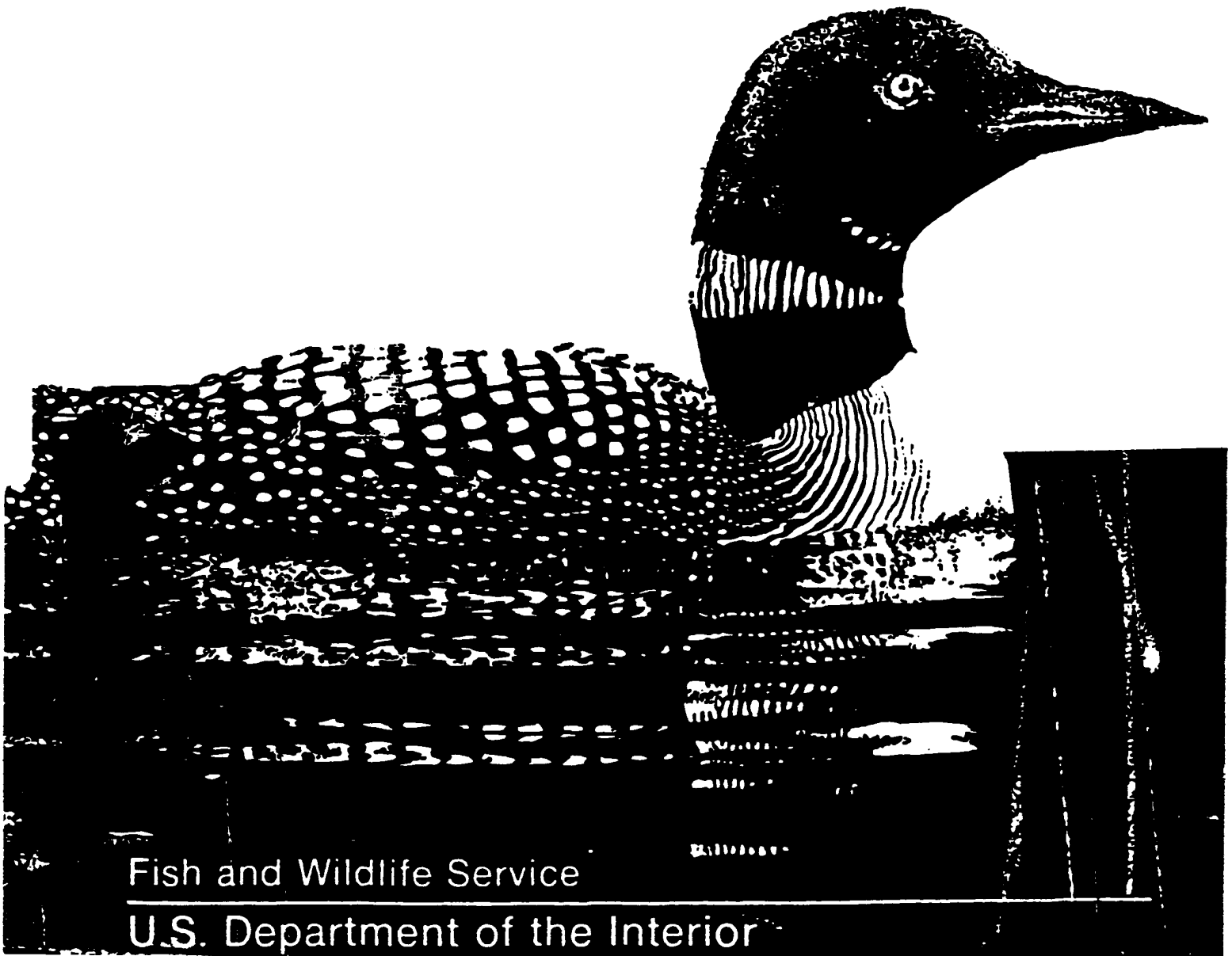
FWS/OBS-80/44

August 1980

## **ISSUES IN FISH AND WILDLIFE PLANNING**



### **Water Resources Planning Under the Fish and Wildlife Coordination Act**



Fish and Wildlife Service

U.S. Department of the Interior

The Biological Services Program was established within the U.S. Fish and Wildlife Service to supply scientific information and methodologies on key environmental issues that impact fish and wildlife resources and their supporting ecosystems.

Projects have been initiated in the following areas: coal extraction and conversion; power plants; mineral development; water resource analysis, including stream alterations and western water allocation; coastal ecosystems and Outer Continental Shelf development; environmental contaminants; National Wetland Inventory; habitat classification and evaluation; inventory and data management systems; and information management.

The Biological Services Program consists of the Office of Biological Services in Washington, D.C., which is responsible for overall planning and management; National Teams, which provide the Program's central scientific and technical expertise and arrange for development of information and technology by contracting with States, universities, consulting firms, and others; Regional Teams, which provide local expertise and are an important link between the National Teams and the problems at the operating level; and staff at certain Fish and Wildlife Service research facilities, who conduct inhouse research studies.

## EXECUTIVE SUMMARY

This paper briefly discusses the more significant provisions of the Fish and Wildlife Coordination Act (1958). It covers pertinent aspects of legislative history, the development and current status (April 1980) of certain policies relevant to administering the Act, and other matters. It is directed primarily to practicing fish and wildlife agency field biologists, planners, and decisionmakers engaged in water resources development activities under the Act. It is not intended to be exhaustive in its treatment.

The Fish and Wildlife Coordination Act provides a basic procedural framework for the orderly consideration of fish and wildlife conservation measures to be incorporated into Federal and Federally permitted or licensed water development projects. The principal provisions of the Act include:

1. a statement of Congressional purpose that fish and wildlife conservation shall receive equal consideration with other project features;
2. mandatory consultation with wildlife agencies with a view to achieving such conservation;
3. full consideration by action agencies of the recommendations stemming from consultation;
4. authority for action agencies to implement such recommendations as they find acceptable.

The FWCA in effect amends, conditions, or supplements other Federal laws and is thus closely linked in its application and interpretation. It is similarly linked to Federal planning standards and procedures. Because of this, interpretations tend to be flexible and evolve, adapting to changing situations.

The following reference matrix outlines selected sections of the Fish and Wildlife Coordination Act which are of particular relevance to planners.

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## INTRODUCTION

The Fish and Wildlife Coordination Act (FWCA) was pioneering environmental legislation which predated much current environmental law. Written in broad and general language, the Act lends itself to continuing interpretation to accommodate changing conditions and needs. This characteristic of language, plus the fact that it is "permissive" law (i.e., acceptance of conservation recommendations is not mandatory with decisionmakers) has fostered a perception by many that the Act is somehow weak in assuring the maintenance of productive habitats for fish and wildlife. Interpretation of the Act has varied among and within agencies and, in the view of many in the environmental community, has tended to lag behind the changing desires and viewpoints of the public.

On the positive side, the Act has assured fish and wildlife management people of procedural opportunities to present their recommendations and to argue for those recommendations through an intricate chain of decisionmakers in the national water development programs. In the case of proposed Federal water projects the chain of decisionmakers extends up to and includes the Office of the President and the Congress of the United States. The "success rate," then, has been directly proportioned to the demonstrated soundness of the conservation measures recommended, the skill and persuasiveness of the fish and wildlife planner, and the receptivity of decisionmakers.

## BACKGROUND

### The Basic Problem

The basic problem which Congress sought to address in enacting FWCA was how to accommodate two aspirations of society that tend to compete or conflict in many contexts. The first is to promote economic development and further human well-being through the maintenance of a viable and thriving economy. The second is to insure the maintenance or restoration of productive habitats and environmental quality, also perceived as essential to human well-being. Economic development, often supported by water projects, can seriously damage or destroy environmental values if pursued with only the development objective in mind. Environmental quality, if pursued similarly, can place severe constraints on economic development.

### General Approach to Problem

Due to this apparent conflict, two National Planning Objectives have evolved in the water resources field under the aegis of the Water Resources Council (WRC)--the National Economic Development (NED) Objective, and the Environmental Quality (EQ) Objective. Within this multi-objective framework it is often feasible to adjust the two Objectives so that both aspects of the human environment are adequately served. Achievement of this balance is the basic thrust of the National Environmental Policy Act and the "Principles and Standards for Planning Water and Related Land Resources" prepared and published by WRC. Implementation of the FWCA is consistent with and complementary to these mandates, even though it was enacted more than a decade earlier.

The FWCA provides a basic procedural framework for the orderly consideration of fish and wildlife conservation measures in Federal and Federally permitted or licensed water development projects. Whenever any waterbody is proposed to be controlled or modified "for any purpose whatever" by a Federal agency or by any "public or private agency" under a Federal permit or<sup>1</sup> license, that agency is required "first" to consult with the wildlife agency<sup>1</sup> with a view to the

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<sup>1</sup> The term "wildlife agency" as used in this report includes the U.S. Fish and Wildlife Service and the head of the State fish and wildlife agency as specified in the Act, and the National Marine Fisheries Service of the Department of Commerce which received FWCA responsibilities in connection with Reorganization Plan No. 4 (October 1970).

conservation of fish and wildlife resources (broadly defined) in connection with that project<sup>2</sup> [Subsection 2(a)]. A report by the Secretary of the Interior (Commerce)<sup>2</sup> or head of the State agency responsible for the administration of fish and wildlife resources, is authorized [Subsection 2(b)] to be prepared and submitted to the action agency<sup>3</sup> or applicant for Federal license or permit. That report, if prepared, must be made available to the Congress or other authorizing agent when decisions are made to authorize (or not to authorize, or authorize with modifications) the project. Other provisions of the FWCA relate to the acquisition and use of project lands and waters for fish and wildlife purposes, the evaluation of project effects including benefits and costs, and related matters more fully covered below.

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<sup>2</sup> The reporting authorization of the Secretary of the Interior was extended to the Secretary of Commerce as a concurrent authority by virtue of Reorganization Plan No. 4.

<sup>3</sup> The term "action agency" as used here means those Federal departments or agencies which plan, construct, operate or maintain a water development project, or which approve and issue permits and licenses, except for any that are exempted from the provisions of FWCA, as noted in the text.



## LEGISLATIVE HISTORY

### Pre-1958

The U. S. Army Corps of Engineers has been engaged in "internal improvements" of navigable waterways at least since 1824 and has been issuing permits for work by others in navigable waters since 1899. The Water and Power Resources Service (formerly Bureau of Reclamation) has been developing the water resources of the West since the Newlands Reclamation Act of 1902. Private development of water resources has been underway since the founding of the Republic, and before.

The first Coordination Act was enacted in 1934, though it was not called by that name. It was a simple Act, seeking to insure that Federal reservoirs provided opportunity for Federal fish hatcheries and resting places for migratory waterfowl. Some of the specific language of the 1934 Act is of interest in understanding the evolution of the present FWCA (see Appendix A).

The version enacted in 1946 was more closely related to the present FWCA, but was more limited in scope with a principal emphasis on mitigation of losses to fish and wildlife resources. It stimulated development of the present institutional organization of wildlife agencies to implement the Act. Under the 1946 authority, many major Federal projects were studied, in some cases rather thoroughly, and some good results were realized in terms of fish and wildlife conservation measures.

### 1958 and Subsequent Amendments

The present Fish and Wildlife Coordination Act (see Appendix B) was enacted on August 12, 1958 and, for the first time, given its statutory title. It was more comprehensive than the 1946 Act. It authorized the installation of means and measures for enhancing (in addition to mitigating or compensating for losses) fish and wildlife resources, and it granted authority to allocate benefits and costs of fish and wildlife as a "purpose" of water resource development projects. The FWCA authorized, under prescribed circumstances, the modification of projects not then 60 percent completed; affirmed the application of the Act to dredge and fill projects and other non-Federal or Federal actions conducted under Federal permit or license; and more clearly authorized land acquisition and use for fish and wildlife purposes. It supplemented other authorities for the transfer of funds to the Fish and Wildlife Service (FWS) from construction agencies for investigations related to Federal projects only. The source of funds could be those appropriated for

"investigations, engineering, or construction," suggesting an intent to establish a continuing participation by the wildlife agency, at least through the construction of projects.

Public Law 89-72, the Federal Water Project Recreation Act (see Appendix C), amended the FWCA in 1965 to (1) remove the 1958 provision (first enacted in 1946) that the costs of mitigation measures for projects constructed by the Water and Power Resources Service were to be borne by the Federal Government; and (2) insert the provision that measures undertaken for enhancement could include (a) "facilities" as well as (b) land acquisition (c) modification of projects, and (d) modification of project operations. The effect of "(1)" was that such costs were thereafter allocated jointly among benefitting project purposes (discussed later). The effect of "(2)" was to enlarge the limited enhancement authority of the 1946 Act to include "facilities" for the first time (a major precedent was found in Section 8 of the Colorado River Storage Project Act (1956) and its use of the term "facilities.")

#### Relation to Other Legislative Authorities

The FWCA of 1958 (P.L. 85-624) is closely related to or dependent on other legislation and the regulations, guidelines, and procedures which have evolved under those authorities. One class of legislation is, in effect, directly amended or supplemented by FWCA. A second class is complementary in nature and of a similar orientation.

The FWCA of 1958 did several things. Section 1 conferred the statutory title "Fish and Wildlife Coordination Act" on the 1934 Act, as amended in 1946, as part of the enacting clause. Section 2 amended the first four sections of the 1946 Act and left standing, without amendment, the other sections of the 1946 Act. Section 3 enacted a new Section 12 of the Watershed Protection and Flood Prevention Act (P. L. 566; see Appendix D). Section 4 authorized the appropriation of funds to "carry out the purposes of this Act." Section 12 of P. L. 566 provides for consultation somewhat similar to that required under FWCA--but it is not a part of FWCA.

"Federally assisted" water projects, such as the watershed projects planned and constructed under Section 3 of P. L. 566, are not covered by the FWCA. As noted above, Section 12 was added to P. L. 566 to substitute for this limitation on coverage of the FWCA. It provides that the Secretary of Agriculture--in practice acting through the Soil Conservation Service (SCS)--shall notify the Secretary of the Interior of proposed work plans for small watershed projects so that the latter--in practice acting through the FWS--may make such investigations and reports as he deems necessary. Subsequent recommendations which "are acceptable to, and agreed to by, the local organization and the Secretary of Agriculture" are incorporated into work plans.

Because of a tendency of local sponsoring organizations not to accept fish and wildlife recommendations, the FWS until recently has not given such SCS projects a high priority in its program. However the Joint FWS-SCS Channel Modification Guidelines published on March 1, 1978 in the Federal Register, brought about a new situation where fish and wildlife recommendations are

receiving greater consideration. A detailed coordination procedure agreed to by both agencies in the Guidelines, as well as other factors, has increased the interest of FWS in these projects. The Guidelines, slightly revised, have been issued as proposed regulations (see 44 Federal Register 76299, 12/26/79) in response to a Presidential directive of July 12, 1978.

Among the authorities considered to be "supplementary legislation" are the Federal Reclamation Laws and various flood control project authorizations. Reclamation authorizations typically begin with a phrase to the effect that the project in question is authorized pursuant to the Reclamation Laws and "Legislation supplementary thereto," or similar. The FWCA is among those laws "supplementary thereto."

Other action agencies' laws which were conditioned or supplemented by the FWCA include not only the Federal Reclamation Laws and various public works authorization Acts, but also the Clean Water Act, Federal Power Act, permitting authorities of the Nuclear Regulatory Commission, and others. Some special provisions of recent individual project legislation have put limits on mitigation for those special projects, and they must be taken into account in any inquiry into authorities to plan for or implement mitigation.

The FWCA (as well as the National Environmental Policy Act) in effect conditions or supplements other water development legislation to require consideration of recommendations generated under the FWCA procedures. A classic statement affirming this principle is set out in Zabel v. Tabb, 430 F2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1972):

Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government-wide policy of environmental conservation is spectacularly revealed in at least two statutes, the Fish and Wildlife Coordination Act and the National Environmental Policy Act.

The Fish and Wildlife Coordination Act clearly requires the dredging and filling agency (under a governmental permit), whether public or private, to consult with the Fish and Wildlife Service, with a view of conservation of wildlife resources. If there be any question as to whether the statute directs the licensing agency (the Corps) to so consult it can quickly be dispelled. Common sense and reason dictate that it would be incongruous for Congress, in light of the fact that it intends conservation to be considered in private dredge and fill operations (as evidenced by the clear wording of the statute), not to direct the only federal agency concerned with licensing such projects both to consult and to take such factors into account.

This opinion signaled a change from earlier periods when the Corps generally interpreted narrowly its mandates under the Rivers and Harbors Act of 1899 to consider only impacts on navigation. The revised viewpoint, revealed by the

courts, established the Corps' authority and duty to consider impacts on fish and wildlife and to deny permit applications where damages were sufficient to justify that decision, even though no adverse impacts on navigation were apparent. The history of this topic is indicative of the nature of change in traditional law and policy. Traditional policy viewpoints tended to resist change, in this example, from 1958 to 1972. However, it should be noted that in some Districts, the Corps of Engineers had reached this position earlier.

For greater detail, the following documents relating to the 1958 Act, its background, and interpretations should be consulted:

1. Senate Report 1981, 85th Congress, July 28, 1958, Committee on Interstate and Foreign Commerce.
2. Hearing on "Coordination Act Amendments," Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries. 85th Cong., 2d Sess. (June 27, 1958).

Several movements to amend the FWCA were initiated during the 70s. These stemmed principally from a series of five workshops conducted around the United States early in the decade to record the dissatisfactions of State fish and wildlife agencies and private conservation organizations with the Act and its implementation. A bill was drafted to cover many of these concerns and was introduced in both Houses of Congress. Hearings were held in 1974 and again in 1978 by the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries. In neither instance did time permit the Committee to complete its markup of a bill and report it for floor action before the end of the Congressional session. The bill was revised frequently during the 70s.

## PARTICIPATION BY THE FISH AND WILDLIFE PLANNER<sup>4</sup>

### Setting

The effectiveness of the fish and wildlife planner is reflected in the level of habitat and habitat productivity preserved, restored, or developed as a result of his or his team's efforts in carrying out the activities authorized under the FWCA. This "level" must be assessed in light of other competing project objectives such as economic development. In this context the fish and wildlife planner will strive to get the "best shake" possible for the resources. This goal is usually best accomplished by establishing credibility and respect with the action agency, the applicant in the case of permits and licenses, and the interested public. The planner must be able to bring sound evidence to bear in evaluating the effects of the proposal and its alternatives, and be able to present recommendations which he can support both by facts and sound logic. This means that the biologist must not only be clearly competent in his own field but must also be able to understand and communicate with other professionals such as economists, engineers, lawyers, hydrologists, and a host of others.

Philosophy and attitude are important and will be reflected in the nature and extent of the results achieved in carrying out the provisions of the FWCA. The fish and wildlife planner should establish beyond doubt that he is an informed advocate for the resource, but in a context which recognizes that the Nation needs sound economic and social development as well as environmental quality. Relevant questions, however, include whether a particular development is needed at this time and place, whether it is the best design and configuration, and whether the adverse effects, if any, can be mitigated. The no-project alternative is sometimes logical and viable but the planner should have a good factual basis for advocating this position. In summary, water development planning is increasingly multi-disciplinary. The future belongs to those planners who can hold their own in that kind of planning environment and discern the public interest at issue both in the economic and environmental areas.

The fish and wildlife planner should have some settled notion of how his findings and recommendations serve the needs and well-being of people--either directly or ultimately. This involves an outlook which comprehends fish and wildlife as real indicators of the health of natural systems in which man is a significant element, an appreciation of esthetic qualities and recreational aspects, the short- and long-term economic values of affected resources, and the relative importance of preserving environmental options in the particular

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<sup>4</sup>The term "fish and wildlife planner" includes any of the several disciplines conducting FWCA studies and investigations. The most typical planner is a fish and/or wildlife biologist.

area of the Nation.

The best planning situation is one in which the biologist can actively participate in the formulation and evaluation of alternative plans and measures as a full member of the project planning team, articulating the needs of the resource persuasively and personally.

#### Definitions and Concepts

The definition of some basic terms and concepts is essential to interpretation of the Act. "Consult" has not been defined in law or in regulation and has varied in practice from simple notification to full-blown participation in formulating project plans. It is properly defined in terms of a procedural framework which insures that true consultation can take place. It encompasses the idea of open and free communication with and among planners.

The definitions of the terms "mitigation," "compensation," and "loss prevention" have evoked widespread controversy. Although the distinctions generally (not always) make little difference in project formulation, evaluation, or cost allocation, they have assumed considerable importance in communication. This paper will defer to the definitions set out in the NEPA regulations promulgated by the Council on Environmental Quality, with which the fish and wildlife planner should be thoroughly familiar (see Appendix E).

The planning biologist should always be aware that project effects (gains and losses--or benefits and costs--or status quo) are measured by comparing future conditions as they are projected to occur in the absence of the project (the benchmark) with conditions expected to occur with the project in place. This "with" and "without" approach is long established in planning principles. It is basic to measuring project effects and determining whether the project is enhancing a resource or whether the effect will be to cause damages which must be prevented, mitigated, or compensated for. The comparison is not of conditions existing before the project with conditions expected to exist after the project is installed. An inventory of "before" situations may be needed, however, as a basis for projecting future "without the project" conditions.

#### Institutional Framework

The fish and wildlife planner should be cognizant of his position in the several institutional systems of which he is a part in carrying out his activities under the FWCA. That system includes (for the FWS and NMFS) a hierarchy of organizational units each playing a necessary function which may vary with the type of project. The Washington Office has a policy making function. It rarely becomes involved in individual Corps of Engineers permit applications--usually only when a case is referred under the Memorandum of Agreement for resolution at the Secretarial level (10 to 20 annually as a rule).

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<sup>5</sup>Memorandum of Agreement between the Secretary of the Interior and the Secretary of the Army, March 24, 1980.

For a Federal project, the Washington Office may be deeply involved in (1) the interagency review and negotiating processes relating to the specific plan immediately before it goes to the Congress, (2) the legislative hearing and other contacts with the Congress necessary to securing authorization (or denial of authorization) of the project for construction, and in some cases, (3) the appropriations process needed to obtain funds to install the project.

To elaborate on this function, it is important to understand the legislative distinction between "authorization" and "appropriation." Federal water projects are authorized by the Congress for construction on the recommendation of a legislative committee. This action in itself does not provide funds although it may authorize the expenditure of funds (usually a set amount). An independent action, involving the appropriations committees of both houses of Congress, and the full Congress, will annually provide the funds to implement (install and operate) the project or program. Appropriations acts almost never change authority provided by other law, but appropriations acts often limit our ability to plan for, monitor, or install mitigation measures and they sometimes forbid use of appropriated funds in carrying out disputed authority.

The FWCA is also an authorizing act. It directs or authorizes consultation, reporting, consideration, and in some cases, installation of fish and wildlife features--in short, a program. Appropriations for FWCA planning are secured directly from the Congress, from transfers of funds from construction agencies, and occasionally from "contributed" funds under Section 1 of FWCA. The level of funding and personnel authorizations is critical to the level of effectiveness of the program under FWCA.

Other "systems" of which the planner is a part include not only (1) his own field-regional-Washington organization but, (2) the environmental community--both local and National, and (3) the water resource planning community. The planner must clearly understand his role within these systems. His ability to perceive and work effectively within them will directly affect the quality and quantity of the Nation's fish and wildlife habitat over the life of the project.

#### Section 1 of FWCA

Some of the language of Section 1 pervades and conditions the balance of the FWCA (reprinted in Appendix B). Other aspects have application beyond the water resources program. Of greatest importance to the planner is the "equal consideration" doctrine of Section 1. Specifically, the Congress stated that a purpose in enacting the FWCA was to ". . . provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of this Act in the United States." [Underscoring added.]

The above statement is fraught with significance in interpreting the FWCA. "Equal consideration" was not defined, as noted, and is given meaning in terms

of prescribed procedures which insure that decisionmakers do, in fact, have opportunity to consider the need, potential, and justification for conservation measures as a major coequal objective of project planning. This phrase, plus another--"coordinated with"--suggest that fish and wildlife were to be considered not only on a par with other traditional water development purposes--as flood control, irrigated agriculture, power, and the like--but that the planning process should insure a true integration of fish and wildlife features in project formulation, and that coordination in planning would be continuous and pervasive. These references, considered in conjunction with the "first shall consult" phrase of Subsection 2(a) noted below, as well as other factors, indicate a full partner status for the fish and wildlife planner at the water development planning table.

We conclude, then, that the intent of Congress was to establish fish and wildlife conservation as a coequal purpose of water development. It should no longer be considered simply as an incidental use which would be considered if found consistent with the "primary use" of the waters of a particular project (as suggested by the language of the 1934 Act in Appendix A).

Another reference in Section 1 of special interest to the planner in carrying out water resource planning aspects of this Act is the final phrase which authorizes the Secretary of the Interior to "accept donations of land and contributions of funds in furtherance of the purposes of this Act." Under this provision, contributed funds can be accepted for FWCA studies. An example would be the acceptance of funds from a private power company to pay for FWCA studies on the proposed installation of a power generating station. This provision, read with preceding provisions of Section 1, has been used as authorization for accepting donated lands and funds in furtherance of actions outside the Federal water development program.

Other provisions of Section 1 are of less relevance to the national water program, but the fish and wildlife planner should be aware of the references to the provision of public shooting and fishing areas including the acquisition of easements across public lands for access; authority for making surveys and investigations of the wildlife of the public domain; and the cooperative assistance authorized with Federal, State, and public or private agencies in the development, protection, rearing and stocking of all species. These authorizations provide a wide range of discretion to the Secretary, particularly when read in conjunction with the Wildlife Act of 1956.

#### Consultation (Subsection 2(a))

One of the provisions of the FWCA which is mandatory is "consultation." Because Subsection 2(a) is central to the Act, it is quoted:

. . . whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal



permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development. [Underscoring added.]

A first question is, who must consult with the wildlife agencies under this directive? The more obvious include the planners and builders of Federal water projects--the Corps of Engineers and the Water and Power Resources Service. Another category is the permit and license issuing agencies of the Federal government--the Corps of Engineers under Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act, Environmental Protection Agency under Section 402 of the Clean Water Act, Federal Energy Regulatory Commission (licensing of hydroelectric plants), Nuclear Regulatory Commission (licensing of nuclear power stations) and any other Federal agency authorizing water development actions. The above list is not exhaustive. Section 2, and succeeding Sections do not apply to the SCS in connection with its small watershed program (because these projects are built, owned, and managed by local sponsors and only assisted by the SCS) nor to the Tennessee Valley Authority [Section 9].

Less obvious is the possible requirement that prospective applicants for Federal permits and licenses also seek consultation before filing formal applications. The language "such department or agency" quoted above can be interpreted to include the applicant although this interpretation has not been vigorously advocated. Many applicants, as a matter of course and logic, do consult prior to applying for permits or licenses. Early participation, when plans and site selections are not yet determined, can save time, effort, money and controversy as compared to situations where consultation occurs only after the plan is formulated. This is believed to be the reason that Congress inserted the "first shall consult" phrase. It is usually advantageous both to the applicant and to the consulting agency to promote early consultation.

Federally "approved" State programs which function in lieu of Federal programs generally are not covered by the FWCA. An example would be an approved Section 402 program which is administered by a State. The theory (not accepted by all) is that the Federal program is not delegated to the State, but that it simply becomes inactive if the State program is brought to Federal standards and criteria and is so certified. It is then an approved State program, not a Federal-delegated program. The court opinion supporting this view, related to Section 402, is Chesapeake Bay Foundation Inc. v. U. S., 453 F. Supp. 122 (E.D. Va., 1978). A conference committee report on this matter

relating to Section 404 of the Clean Water Act is instructive.<sup>6</sup>

Note that for an approved Section 404 program, the State must show, in addition to other standards and criteria, that it has the authority "to assure continued coordination with Federal and Federal-State water-related planning and review processes." [Section 404(h) (1) (H)]. The perceived intent of this language was to assure continuation of such processes as the kind of consultation that occurs under FWCA. How this subsection will be interpreted, finally, remains to be seen as "approved" State programs appear.

The consultation requirement also applies to certain loan and grant programs, as well as small watershed projects if and when the projects require a Federal license or permit. Again, where Federal permits or licenses will be required, the planner should strive to consult as early as possible in the planning phase, particularly in these larger projects which have a high potential for destroying or damaging productive habitats.

As to the types of waters affected, the reach of the FWCA is to all waters to which relevant Federal licensing or permitting authorities extend. That is, the FWCA authority follows the authorities of the Federal agency which is required to consult with wildlife agencies. In the case of the Section 404 program, for instance, it follows the Corps' extension of jurisdiction into wetlands which were not previously included within that jurisdiction.

Consultation is mandated by FWCA both with the Federal wildlife agencies, and with those of the States. This dual consultation is both a strength and weakness. If all parties are in agreement, the recommendations in the report will carry more weight. If they are not, it will be a challenge to the planner to establish some area of agreement if at all possible.

The principal procedural elements of consultation include: (1) timely notification to the wildlife agencies of the initiation of studies; (2) opportunity for continuing participation in planning which begins at the early stages such as in scoping meetings where decisions are made on the needed studies, who will do them, and when they will be prepared; and (3) the mechanics of coordinating FWCA compliance with the consultation and review requirements of other environmental legislation. The scoping meeting is directed by the NEPA regulations for projects to which NEPA applies.

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<sup>6</sup>"The conferees wish to emphasize that such a state program is one which is established under state law and which functions in lieu of the federal program. It is not a delegation of federal authority. This is a point which has been widely misunderstood with regard to the permit program under Section 402 of the Act. That section, after which the conference substitute concerning state programs for the discharge of dredged or fill material as model [sic], also provides that state programs which function in lieu of the federal program and does not involve a delegation of federal authority." (H. Rept. No. 95-830, 95th Congress, 1st Sess. 3 (1977) reprinted in U. S. Code Cong. & Admin. News 424, 4479 (1977)).

Last in this section, and perhaps most important, is the objective of the required consultation. The goal stated in Section 1 of the FWCA is to achieve the conservation of fish and wildlife resources. "Conservation," in the clear context of the language, includes the concepts of enhancement and loss minimization. The end result of consultation, then, should be the maintenance of a level of fish and wildlife productivity that is "adequate to optimum" for the well-being of present and future generations of people. Such a level of environmental quality links with the "man and nature in harmony" objectives of NEPA. It suggests in various contexts a need to maintain good habitats; in others it may require restoration or enhancement ("development and improvement" are the terms used in Subsection 2(a)). Fish and wildlife are certainly indicators of a good human environment--they also contribute more directly to human well-being, probably in ways as yet inadequately described by biological research.

How does one measure habitat productivity for purposes of FWCA planning? The Habitat Evaluation Procedures under development and refinement by the FWS and cooperating agencies will provide one such measurement technique which can be applied to habitats that will be altered, as well as to habitats identified for substitute development. Further information on such procedures can be obtained from the

Project Impact Evaluation Group  
Western Energy and Land Use Team  
U. S. Fish and Wildlife Service  
Office of Biological Services  
Drake Creekside Building  
2625 Redwing Road  
Fort Collins, CO 80526

#### Reporting (Subsection 2(b))

Reporting is essentially a formal means of communicating. The findings and recommendations of the fish and wildlife planner are communicated to project decisionmakers by at least three means: (1) orally in the interactive planning process, (2) through notes and memoranda (as the "planning aid letter"), and finally (3) through the formal reporting authorized by Subsection 2(b). If the first two means are completely successful, the formal report might consist of a record of that fact and an endorsement of the project to be recommended or authorized. This ideal situation will rarely happen in major Federal projects though it may happen in some smaller licensed or permitted projects.

The Congressional authorization for reporting is given to the Secretary of the Interior (or Commerce). The consultation mandate is given to the FWS (or NMFS). Again, the language of Subsection 2(b) is critical to a discussion of reporting and is quoted segmentally with commentary following:

- (1) "In furtherance of such purposes . . . ."

The reference is to the conservation purposes stated at the end of the preceding subsection, as well as to the equal consideration doctrine of Section 1. These have been discussed above.

- (2) . . . the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects and any report of the head of the State agency exercising administration over the wildlife resources of the State . . .

In practice, the Secretary of the Interior has delegated his reporting responsibilities to the FWS (and the Secretary of Commerce to NMFS). Thus, when the fish and wildlife planner prepares a Subsection 2(b) report he is proposing a report which, when signed, is a Secretarial report. Actual signature of these reports has been, at least since December 1958 for FWS, a delegated responsibility of the Regional Directors. In some recent instances, the responsibility has been further delegated to Area Managers in FWS.

The relevant State agency may be the State fish and wildlife agency, or a Department of Natural Resources within which the fish and/or wildlife agency is housed. This varies by State.

The concerns of State fish and wildlife agencies are usually comprehended in the reports of Federal wildlife agencies, and, therefore, separate State reports have seldom been submitted (even though that option does exist). States are usually important suppliers of data necessary to the consultation and report. They are full partners in arriving at recommended means and measures for achieving the conservation purposes of the Act, and usually indicate concurrence with the report. State biologists participate in the habitat evaluations that are central to the preparation of effective reports. There are obvious advantages in having reports that represent consensus.

The terms "wildlife" or "wildlife resources" as used in the Act are defined in Section 8 and include not only fish and wildlife per se, but also the various elements of their habitat and life support systems. The planner, then, can take cognizance of a wide spectrum of environmental factors depending on the philosophy to which he or his organization subscribes.

- (3) . . . based on surveys and investigations conducted by the United States Fish and Wildlife Service [and NMFS] and such State agency for the purposes of determining the possible damage to wildlife resources and for the purpose of determining means and measure that should be adopted to prevent the loss or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources. . .

This part of Subsection 2(b) provides a further link to the consultation process of Subsection 2(a). The investigations conducted pursuant to 2(a) are to provide the facts basic to the report, and 2(b) restates the 2(a) objectives but with some added interpretation. The "means and measures" can include, at a minimum, the facilities, land acquisition, and modification of the project or project operations which are referenced in Subsection 2(d) as

being appropriate to achieve enhancement ("development and improvement"). The scope of measures is broader in the case of loss minimization measures. The latter could also include, among other things, provision by the project or project sponsors of the annual costs of operation and maintenance of mitigation lands and facilities (prohibited for enhancement measures under 2(d) but covered in the Federal Water Project Recreation Act), additional pre- or post-construction studies to determine detrimental impacts which could not be forecast with confidence, and other "means" which might be applicable to the particular project and which are reasonable and capable of justification to the planning, construction, or permitting agency.

- (4) [the report]. . . shall be made an integral part of any report prepared or submitted by any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which this Act applies.

The thrust of this part of 2(b) is to insure that the ultimate decisionmaker, as well as intermediate officials in the often-long planning and decision trains, have access to the specific findings and recommendations of the wildlife agencies. Specifically, it is not considered enough that the planning staff in a District Army Corps of Engineer's office knows what the wildlife agencies recommended. Rather, every point in the decision chain, up to and including especially the Congress of the United States, must have knowledge of the recommendations for wildlife conservation-including those recommendations which were not accepted by the earlier links in the decision chain. In the case of permitted actions, the local decisionmaker (e. g., District Engineer for Corps permits) would also be assured of having access to the wildlife agency recommendations at the time his decisions are made.

- (5) Recommendations of the Secretary of the Interior shall be as specific as practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. . .

This language is fairly straightforward and self-explanatory. The "as specific as practicable" phrase does suggest that lack of time or other resources or the state-of-the-art for projecting effects may be such that it is not always possible to predict impacts and prescribe in detail the measures needed for mitigating or compensating damages attributable to the project. In such cases, the report should indicate the situation and recommend further

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<sup>7</sup> For a more comprehensive discussion of present FWS mitigation policy see U.S. Fish and Wildlife Mitigation Policy-Final Draft, Washington Office-Environment (May 8, 1980).

The balance of Subsection 2(b) is more appropriate for another section of this paper (see "Consideration").

### Background Factors in Reporting

Scheduling. It is important to be aware of several background factors concerning the reporting process. The scoping process provided for in the NEPA regulations (for major Federal actions) will generally indicate the time frame within which the 2(b) report will be scheduled. In other situations, a time frame may be negotiated with the action agency or applicant. Time limits are imposed in some interagency memoranda of agreement, and in regulations. To the maximum extent possible, reporting should be scheduled to mesh with other environmental reviews. For example, the 2(b) report should be available in time to be accommodated in the environmental impact statement on the project.

Content. Content of reports is set out in a variety of memoranda and instructional materials. Generally, the report should include the following where appropriate (the detail expected can frequently be tailored to the size and complexity of the proposed project):

- a summary of the investigations, findings, and conclusions including (for Federal and major licensed projects) some level of inventory and geographic delineation of existing and projected resource values, particularly of those resources likely to be affected by the project, either directly or indirectly;
- assessment methods, assumptions, and pertinent data;
- a statement of wildlife problems and needs, including human needs, and a statement of wildlife planning goals (especially for Federal projects);
- positive and negative effects of projects and alternative project proposals and needed conservation features for each, with particular emphasis on the project alternative to be selected for recommendation, if known;
- further studies needed for accurate evaluation of effects;
- (for Federal and Federally licensed projects) to the extent possible, the dollar costs of all means and measures recommended;
- (for Federal projects) the results expected in terms of dollar benefits for recommended enhancement measures (in order that cost allocations provided for in 2(f) can be made. Allocations of project costs are normally made to benefitting purposes using dollar benefits and costs). Reports on licensed or permitted projects should also include such factors when easily obtained and if such information would serve a useful purpose;

- the results expected in non-dollar terms for mitigatory measures, particularly. These measures would be displayed (or reflected) in the Environmental Quality (EQ) Account prescribed by the WRC Principles and Standards;
- any alternative mitigation schemes, with their costs and results.

#### Some Concepts in Federal Project Plan Formulation.

"Enhancement" and "purpose" connote the generation of project benefits which, in 1958 and subsequently, have usually been interpreted as dollar measures of the benefits from human recreational uses of fish and wildlife resources. These National Economic Development (NED) benefits continue to be appropriate and the WRC has prepared a procedural manual for implementing the Principles and Standards which specifies several optional methods of computing such recreational values. The Project Impact Evaluation (PIE) Group in Ft. Collins, Colorado is also preparing a procedure which will be consistent with that prescribed by WRC. Some of the alternative procedures for computing monetary benefits may require the use of contract assistance, at least during a transition period.

Fish and wildlife enhancement is recognized as a coequal purpose of water resource development, indicated by the fact that costs may be allocated to it. This is central to the "purpose" concept discussed above. This includes for Federal projects, the allocation of separable costs (for features solely included in project plans because of their utility for fish and wildlife enhancement) and joint costs (for features which are essential to or shared among all project purposes--as the dam itself and lands underlying the reservoir). "Joint in use, joint in cost."

Project costs in the past have usually been allocated under the "separable costs-remaining benefits" method of cost allocation although there are other methods including one prescribed for multiobjective allocation under the Principles and Standards. The basic principle of joint responsibility for minimizing losses to fish and wildlife resources stands, however.

It is important to know that, although fish and wildlife "enhancement" is a necessary attribute of "project purpose" in conventional water resources planning jargon, fish and wildlife conservation (especially in terms of prevention of losses or the mitigation or compensation of losses) is to be a goal of all Federal projects and Federally permitted or licensed water projects. This is related to the fact that the FWCA in effect conditions or supplements other authorities to authorize consideration of fish and wildlife opportunities in connection with such projects.

The objective of mitigation measures is to preserve fish and wildlife values that would exist in the absence of the project. The costs of these measures are also included in joint costs of the project on the basis that the benefited purposes of the project share jointly in the damage, and in the responsibility for preventing the threatened or actual destruction of fish and wildlife values. The installation and operation of fish and wildlife

mitigation measures does not create benefits to these resources (see Senate Report 1981) although it may incidentally create benefits to other purposes (as a wildlife management area for mitigation of losses may create certain flood control storage benefits which the project can "claim").

#### Cost Sharing.

The reference of Subsection 2(f) to reimbursement of costs is, in effect, interpreted in the provisions of P. L. 89-72, the Federal Water Project Recreation Act (1965, as amended). Public Law 89-72 provides that, as a general rule, non-Federal public bodies are responsible for paying (or repaying) 25 percent of the separable costs allocated to fish and wildlife enhancement at Federal projects, and 100 percent of the annual costs of operation and maintenance of such lands and facilities. The Federal government would assume all other allocated costs--i.e., 75 percent of separable costs and 100 percent of joint costs allocated to the fish and wildlife purpose. The source of repayment funds can be limited to revenues from user fees.

An important exception to the cost sharing requirements of P. L. 89-72 relates to areas or facilities proposed "for inclusion within a National Recreation Area, or [that] are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife." The Act does not specify a cost sharing formula for such facilities. In practice, provision of lands, water, and facilities for enhancement of migratory waterfowl resources have been considered nonreimbursable (100 percent paid by the Federal government, no costs to be "reimbursed" by non-Federal interests). Controversy exists with respect to facilities proposed to enhance habitats of "interstate" anadromous fish. The Office of Management and Budget has not accepted anadromous fish as falling within the provisions of the language quoted above (which would make their costs nonreimbursable), although one project (the Touchet Project in Washington) was authorized with costs allocated to the enhancement of anadromous fish, which costs were declared to be nonreimbursable Federal costs.

Several other aspects of P. L. 89-72 are noteworthy. In the absence of an agreement with a non-Federal public body to cost share enhancement measures, the construction agency may still acquire lands [Section 3(b)] to "preserve the recreation and fish and wildlife enhancement potential of the project" and hold them for ten years after the initial operation of the project. Following that, in the absence of the proper agreements, the Act provides for the disposition of lands so acquired.

Other provisions limit the allocation of costs to recreation and fish and wildlife enhancement to (in effect) 50 percent of project costs excluding allocation to anadromous fisheries, shrimp, and migratory birds [Section 9], and existing reservoirs under the jurisdiction of the Secretary of the Interior may be provided with recreation and fish and wildlife features (excluding reservoirs in the National Refuge System). The limit on costs is



\$100,000 per reservoir, to be matched by a non-Federal entity [Section 7] such as a State fish and wildlife agency.

Although the P. L. 89-72 cost sharing provisions discussed above have been of little practical effect, the planning biologist should be aware of them in conducting business under the FWCA. The Act does not apply to small watershed projects (USDA), to TVA projects, and others noted in Subsection 6(d) and (e).

The reasons why P. L. 89-72 provisions have not been attractive include the fact that the most likely source of repayment is the State fish and wildlife agency, which perceives better ways of spending their funds in terms of meeting their objectives. Also, it is not generally the local interests pressing for the project. As a result, they have frequently objected to paying for enhancement features when there are uncompensated losses to fish and wildlife.

Public Law 89-72 does not relate to mitigation measures except indirectly. It repealed that 1958 provision of the FWCA which made mitigation costs nonreimbursable (Federal) for reclamation projects, allowing the normal cost allocation and reimbursement policies to work their way. That is, these joint project costs (for mitigation) are allocated among project purposes, some of which are reimbursable (to the Federal government), as power and water supply, for example.

#### Consideration (By Action Agencies)

The "full" consideration mandated for FWCA report findings and recommendations [Subsection 2(b); see below] has varied widely over time within and among action agencies. The level of consideration has been thought of as sufficiently unsatisfactory in some quarters as to stimulate efforts to amend the Act and to develop proposed regulations. As noted, "full consideration" is best achieved by "due process" in terms of insuring adequate opportunity to present and defend recommendations, to provide for consideration of public viewpoints, and to provide various guidelines for decisionmaking.

Resuming the specific review of the language of FWCA, as it relates to "consideration," we return to the conclusion of Subsection 2(b):

The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such project, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

The critical terms are "full consideration," "justifiable means and measures," and "maximum overall project benefits." It is here that the permissive nature of the FWCA has been most apparent and subject to wide interpretation. First, and most importantly, the recommendations of the wildlife agencies need not be

adopted by the action agency decisionmaker. However, in the case of Federal projects, Congress is really the final decisionmaker, and it is important that all mitigation options be brought to its attention.

The term "justifiable" traditionally has meant that a project, or feature of a project, must meet a benefit-cost test. That is, dollar benefits must exceed dollar costs. This test has been adequate to justify the inclusion of certain enhancement features usually (but not always) related to the provision of recreational opportunities. However, it has been considered inappropriate for judging the merit of mitigation measures. Despite admonitions against the use of b-c analyses to justify mitigation measures, construction agencies have used such analyses and on that basis have rejected many such proposals, particularly when land acquisition was involved. The Habitat Evaluation Procedures, as elsewhere noted, are believed to provide an improved basis for justification of mitigation measures.

The term "maximum overall project benefits" was intended to include not only the dollar-measured benefits of projects but also the non-dollar effects. This is apparent from the fact that the Senate Report 1981 recognized that in some instances, the level of dollar benefits to some purposes might have to be diminished "in some slight degree" in order to accomplish the wildlife conservation objectives of the Act. Presumably, this would help assure maximum overall project benefits. This view is consistent with the philosophy of the Principles and Standards (as well as its predecessor, Senate Document 97). In addition, it seems quite consistent with NEPA's reference [Subsection 102(2)(B)] to the development of procedures to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."

The FWCA provides authority to Federal construction agencies to install measures proposed for fish and wildlife purposes. This continuing authority is set out principally in Subsection 2(c) as follows:

Federal agencies authorized to construct or operate water-control projects are hereby authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with Section 3 of this Act, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects.

The authority is confined to Federal agencies constructing and operating water projects. The authority is continuing, applying retroactively to projects not "substantially completed" on August 12, 1958 (date of FWCA enactment) including, by inference, projects authorized after that date. The language of Subsection 2(g) further illuminates this application:

The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized

before or after the date of the enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment . . . if the construction of the particular project or unit thereof has been substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure. [Underscoring added.]

This subsection has broader application than 2(c), applying to all of the subsections of Section 2--including the consultation, consideration, and installation authorities. The only class of projects exempted from the provisions of the Act, then, are those which were 60 percent or more completed on August 12, 1958. (Note, however, that several other interpretations have been offered as to applicability.)

Coming back to Subsection 2(c), the specific authorization to construction agencies to acquire land was considered in 1958 to be a major improvement in the powers granted by the 1946 Act. Senate Report 1981 declared that "in very many cases, the availability of lands . . . for these purposes is the key to adequate and satisfactory measures to compensate for losses and to provide for the enhancement and improvement of fish and wildlife. The conservation agencies are restricted and hampered by this lack of authority . . ." Despite the new 1958 authority, relatively little land has been acquired specifically for fish and wildlife, apart from land that would have been acquired for other "joint" project uses.

The failure comes back principally to the perceptions of the term "justifiable means and measures" used in Subsection 2(b). Land acquisition, especially if condemnation is involved, tends to be controversial. The key to the planner's success lies not only in providing a convincing case, as through the use of habitat evaluation procedures, but also by participating early in the project planning and assuring the acquisition of adequate lands for joint (all) project purposes. The fish and wildlife planner should review the "Joint Policy of the Departments of the Interior and of the Army Relative to Reservoir Project Lands" dated February 19, 1962, which followed a long study and discussion of Federal land acquisition policies. It has not been abrogated and, despite certain technical shortcomings, is still in effect.

To conclude on 2(c), the proviso<sup>8</sup> relates solely to projects authorized

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<sup>8</sup> "Provided, That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost

prior to FWCA enactment but not then constructed and sets out certain logical standards and constraints for the addition to such project plans of fish and wildlife features.

Subsection 2(d) has been widely misunderstood. It simply states that planning, installation, and maintenance costs for "conservation" measures (which include mitigation, compensation, loss prevention, and/or enhancement features) are to be included and integrated into project financial and economic analyses, as are the costs of features to serve other purposes. The proviso at the end, however, is limited to enhancement ("development and improvement") measures only, and limits the kinds of costs that are appropriate. These terms are broadly construed so that the range of planning recommendations is comprehensive. However, there is one exception of importance--the declaration that the costs of operation of wildlife enhancement facilities are not to be included as "an integral part" of project costs. This is generally consistent with the provisions of P. L. 89-72 which require non-Federal public bodies to pay "all costs of operation, maintenance, and replacement incurred therefor . . ." The concluding phrase of 2(d) does not mean that O & M costs of mitigation measures are not integral project costs or that they should not be borne by project beneficiaries and funded (budgeted) by the construction agency which had responsibility for constructing the project.

Subsection 2(f) relates further to benefits and costs of Federal projects and their treatment and reporting by the construction agency. It applies only to Federal projects. In essence, it accords fish and wildlife the status of project "purpose"--requiring an estimation of (dollar) enhancement benefits and costs and the allocation of joint project costs to enhancement measures. With respect to mitigation, 2(f) only provides for an estimation of losses (not in dollars), and the monetary costs of such means and measures.

### Project Installation and Operation

Subsection 3(a) has its antecedents in the 1934 Act and simply provides that, for Federal projects, adequate provision shall be made "consistent with the primary purposes" of the project for the use of project lands and waters for fish and wildlife purposes. To recapitulate, the FWCA provides for consultation, reports and recommendations; authority to install and acquire properties; and finally (in 3(a)) authority to use lands and waters so acquired for fish and wildlife purposes.

Subsection 3(b) provides some guidance on procedures for effecting the use of lands and waters. It provides for the development of "general plans" to

of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interest.

govern such use, to be signed by the head of the primary administering agency (as the Corps of Engineers or the Water and Power Resources Service), the Secretary of the Interior, and the head of the State fish and wildlife agency. Contents of the general plan are not specified in the statute but they have tended to be general, principally identifying the area covered. They have often been given little emphasis.

Subsection 3(b) also specifies that such lands are to be made available to the Secretary of the Interior when they "have value in carrying out the national migratory bird management program" or to the State fish and wildlife agency in other instances. The direction is preceded by the phrase "shall be made available, without cost for administration." The meaning of the phrase has grown increasingly obscure, particularly in light of other subsequent requirements for cost sharing, cost allocation, and the like which are more specific and direct in nature. The phrase is not of major current interest.

### Other Aspects

The prerogatives of the Secretary of Agriculture are specially noted and preserved at various points in the FWCA including the proviso in Subsection 3(b) relating to making lands available to States for fish and wildlife management. Other references include the exemption of Federally assisted small watershed projects (SCS), the provision [3(f)] that lands acquired within the exterior boundaries of a national forest shall be added to and administered accordingly (unless migratory bird areas are involved), and the exemption of impoundments less than ten acres in size from the provisions of the Act [Subsection 2(h)] which eliminates most livestock and farm ponds.

In cases where doubt remains as to the authority to acquire lands, waters, and rights at Federal projects, Subsection 3(c) is fairly specific (Section 2(c) confers land acquisition authority "in accordance with section 3 of this Act"). Subsection 3(c) provides that the properties acquired shall be "as reasonably needed to preserve and assure for the public benefit the wildlife potentials of the particular project area." The language seems clear, though it is sufficiently general to have been subject to considerable interpretation. It is clear that properties to be acquired at projects not yet authorized should be included wherever possible in the project authorizing documentation going to Congress. Where such properties are to be acquired in connection with projects already authorized, the debate has centered on whether or not the proviso<sup>9</sup> requires the construction agency to go to Congress for specific authorization. More often than not, the construction agency will go to Congress to authorize the acquisition of significant additions to lands and waters at authorized projects. This decision to seek Congressional authorization may originate within the action agency or at the request of OMB.

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<sup>9</sup>"Provided . . . in the case of a project previously authorized, no such properties shall be acquired unless specifically authorized by Congress, if specific authority for such acquisition is recommended by the construction agency."

or the Secretary. It is important to note that the Department of the Interior has relied upon 3(c) as authority to acquire and condemn lands.

Subsection 3(d) provides for the continued use of fish and wildlife properties acquired under this section for the purposes of this section. Subsection 3(e) is self explanatory and (f) has been previously discussed.

Section 4 relates to the management of properties made available to the Secretary of the Interior on account of their value to the national migratory bird management program. It provides that State game laws will be adhered to and that the Secretary may make available such properties to State agencies if he finds it in the public interest to do so, but with the option of resuming direct management if he finds that the State has relinquished management and administration for the purpose intended.

Section 5 is concerned with investigations of the effects of polluting substances on fish and wildlife. It has never been used to any significant degree and probably will not be so long as the Clean Water Act remains effective.

Section 5A has special reference to conservation of fish and wildlife in connection with the activities of the Corps of Engineers in the Upper Mississippi River. Section 6 is an authorization for appropriations and personnel to implement the Act. Actual requests for appropriations of funds are submitted annually to the Congress. Some funds are appropriated directly to Federal wildlife agencies, others are appropriated to and transferred from the construction agencies for FWCA studies under Section 2(e), and still other funds may be obtained under Section 1, as from private power companies.

Section 7 provides penalties for persons violating rules and regulations promulgated in accordance with FWCA. Section 8 defines "wildlife" and "wildlife resources" and should be carefully read. As noted earlier, this definition is so encompassing that it covers a very wide range of environmental values.

Application of FWCA to the various forms of comprehensive planning, though not as clear-cut as project planning and review, can be asserted. Particularly with the current interpretations of Level B planning (WRC), such plans will condition the project-specific Level C planning. Also, Section 208 planning will condition and "drive" the implementation of the Section 402 and 404 programs under the Clean Water Act. In short, comprehensive planning in future may have a more profound effect on actual development of water resources in the Nation.

## SUMMARY

The FWCA is a "living document" which can and does adjust in interpretation to changing conditions and viewpoints. One major purpose of the Act is to provide procedural opportunities for wildlife agencies to "coordinate" with action agencies. Through this procedural process involving consultation, investigation, and the reporting and consideration of findings and recommendations, wildlife agencies have an opportunity to offer and argue for means and measures to benefit fish and wildlife resources. In turn, the FWCA provides action agencies the authority to implement such recommendations as they find acceptable.

However, because acceptance of conservation recommendations is not mandatory with decisionmakers, the FWCA does not guarantee results which will be beneficial to fish and wildlife. Therefore, its effectiveness in assuring the maintenance of environmental quality must depend in part on the skills and dedication of fish and wildlife planners, and the ability of project officers to give an objective review and consideration of recommended means and measures.

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## APPENDIX A

Public Law 121 of March 10, 1934 (early version of the Fish and Wildlife Coordination Act) Selected Sections:

Sec. 3 (a). Whenever the Federal Government . . . impounds water for any use, opportunity shall be given to the Bureau of Fisheries and/or the Bureau of Biological Survey to make such uses of the impounded waters for fish-culture stations and migratory-bird resting and nesting areas as are not inconsistent with the primary use of the waters and/or the constitutional rights of the States. In the case of any waters heretofore impounded . . . the Bureau of Fisheries and/or the Bureau of Biological Survey may consult with the Bureau of Reclamation or other governmental agency controlling the impounded waters, with a view to securing a greater biological use of the waters not inconsistent with their primary use . . .

(b) Hereafter, whenever any dam is authorized to be constructed, either by the Federal Government itself or by any private agency under Government permit, the Bureau of Fisheries shall be consulted, and before such construction is begun or permit granted, when deemed necessary, due and adequate provision, if economically practicable, shall be made for the migration of fish life from the upper to the lower and from the lower to the upper waters of said dam by means of fish lifts, ladders, or other devices.

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Sec. 6 . . . PROVIDED, That no authority is given in this Act for setting up any additional bureau or division in any department or commission, and shall not authorize any additional appropriation for carrying out its purposes.

APPENDIX B  
The Fish and Wildlife Coordination Act  
(P.L. 85-624, 1958)

SEC. 1. For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of this Act in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of this Act; (2) to make surveys and investigations of the wildlife of the public domain including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of this Act.

SEC. 2. (a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

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\*The Act of March 10, 1934, 48 Stat. 401, as amended by the Act of August 14, 1946, 60 Stat. 1080; the Act of June 19, 1948, 62 Stat. 497; the Act of August 12, 1958, 72 Stat. 563; 16 U. S. C. 661 et seq., and the Act of July 9, 1965, 79 Stat. 213.

The Act of August 12, 1958 established the official title of this legislation as the "Fish and Wildlife Coordination Act"; it also revised the first four sections of the legislation and contains an authorization for appropriations.

(b) In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which this Act applies. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

(c) Federal agencies authorized to construct or operate water-control projects are hereby authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 3 of this Act, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects: Provided, That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interest.

(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this section shall constitute an integral part of the cost of such projects: Provided, That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for (1) land acquisition, (2) facilities as specifically recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities.

(e) In the case of construction by a Federal agency, that agency is authorized to transfer to the United States Fish and Wildlife Service, out of appropriations or other funds made available for investigations, engineering, or construction, such funds as may be necessary to conduct all or part of the investigations required to carry out the purposes of this section.

(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) an estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs, if any, to be reimbursed by non-Federal interests.

(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

(h) The provisions of this Act shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

SEC. 3. (a) Subject to the exceptions prescribed in section 2 (h) of this Act, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision,

consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interests therein, acquired or administered by a Federal agency, in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 2 of this Act.

(b) The use of such waters, land, or interests therein for wildlife conservation purposes shall be in accordance with general plans approved jointly (1) by the head of the particular department or agency exercising primary administration in each instance, (2) by the Secretary of the Interior, and (3) by the head of the agency exercising the administration of the wildlife resources of the particular State wherein the waters and areas lie. Such waters and other interests shall be made available, without cost for administration, by such State agency, if the management of the properties relate to the conservation of wildlife other than migratory birds, or by the Secretary of the Interior, for administration in such manner as he may deem advisable, where the particular properties have value in carrying out the national migratory bird management program: Provided, That nothing in this section shall be construed as affecting the authority of the Secretary of Agriculture to cooperate with the States or in making lands available to the States with respect to the management of wildlife and wildlife habitat on lands administered by him.

(c) When consistent with the purposes of this Act and the reports and findings of the Secretary of the Interior prepared in accordance with section 2, land, waters, and interests therein may be acquired by Federal construction agencies for the wildlife conservation and development purposes of this Act in connection with a project as reasonably needed to preserve and assure for the public benefit the wildlife potentials of the particular project area: Provided. That before properties are acquired for this purpose, the probable extent of such acquisition shall be set forth, along with other data necessary for project authorization, in a report submitted to the Congress, or in the case of a project previously authorized, no such properties shall be acquired unless specifically authorized by Congress, if specific authority for such acquisition is recommended by the construction agency.

(d) Properties acquired for the purposes of this section shall continue to be used for such purposes, and shall not become the subject of exchange or other transactions if such exchange or other transaction would defeat the initial purpose of their acquisition.

(e) Federal lands acquired or withdrawn for Federal water-resource purposes and made available to the States or to the Secretary of the Interior for wildlife management purposes, shall be made available for such purposes in accordance with this Act, notwithstanding other provisions of law.

(f) Any lands acquired pursuant to this section by any Federal agency within the exterior boundaries of a national forest shall, upon acquisition, be added to and become national forest lands, and shall be administered as a part of the forest within which they are situated, subject to all laws applicable to lands acquired under the provisions of the Act of March 1, 1911 (36 Stat. 961), unless such lands are acquired to carry out the National Migratory Bird Management Program.

SEC. 4. Such areas as are made available to the Secretary of the Interior for the purposes of this Act, pursuant to sections 1 and 3 or pursuant to any other authorization, shall be administered by him directly or in accordance with cooperative agreements entered into pursuant to the provisions of the first section of this Act and in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon, as may be adopted by the Secretary in accordance with general plans approved jointly by the Secretary of the Interior and the head of the department or agency exercising primary administration of such areas: Provided, That such rules and regulations shall not be inconsistent with the laws for the protection of fish and game of the States in which such area is situated (16 U.S.C., sec. 664): Provided further, That lands having value to the National Migratory Bird Management Program may, pursuant to general plans, be made available without cost directly to the State agency having control over wildlife resources, if it is jointly determined by the Secretary of the Interior and such State agency that this would be in the public interest: And provided further, That the Secretary of the Interior shall have the right to assume the management and administration of such lands in behalf of the National Migratory Bird Management Program if the Secretary finds that the State agency has withdrawn from or otherwise relinquished such management and administration.

SEC. 5. The Secretary of the Interior, through the Fish and Wildlife Service and the Bureau of Mines, is authorized to make such investigations as he deems necessary to determine the effects of domestic sewage, mine, petroleum, and industrial wastes, erosion silt, and other polluting substances on wildlife, and to make reports to the Congress concerning such investigations and of recommendations for alleviating dangerous and undesirable effects of such pollution. These investigations shall include (1) the determination of standards of water quality for the maintenance of wildlife; (2) the study of methods of abating and preventing pollution, including methods for the recovery of useful or marketable products and byproducts of wastes; and (3) the collation and distribution of data on the progress and results of such investigations for the use of Federal, State, municipal, and private agencies, individuals, organizations, or enterprises.

SEC. 5A. In the management of existing facilities (including locks, dams, and pools) in the Mississippi River between Rock Island, Illinois, and Minneapolis, Minnesota, administered by the United States Corps of Engineers of the Department of the Army, that Department is hereby directed to give full consideration and recognition to the needs of fish and other wildlife resources

and their habitat dependent on such waters, without increasing additional liability to the Government, and, to the maximum extent possible without causing damage to levee and drainage districts, adjacent railroads and highways, farm lands, and dam structures, shall generally operate and maintain pool levels as though navigation was carried on throughout the year.

SEC. 6. There is authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions of this Act and regulations made pursuant thereto, including the construction of such facilities, buildings, and other improvements necessary for economical administration of areas made available to the Secretary of the Interior under this Act, and the employment in the city of Washington and elsewhere of such persons and means as the Secretary of the Interior may deem necessary for such purposes.

SEC. 7. Any person who shall violate any rule or regulation promulgated in accordance with this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or imprisoned for not more than one year, or both.

SEC. 8. The terms "wildlife" and "wildlife resources" as used herein include birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent.

SEC. 9. The provisions of this Act shall not apply to the Tennessee Valley Authority.

## APPENDIX C

### FEDERAL WATER PROJECT RECREATION ACT\*

#### AN ACT

To provide uniform policies with respect to recreation and fish and wildlife benefits and costs of Federal multiple-purpose water resource projects, and to provide the Secretary of the Interior with authority for recreation development of projects under his control.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress and the intent of this Act that (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly; (b) planning with respect to the development of the recreation potential of any such project shall be based on the coordination of the recreational use of the project area with the use of existing and planned Federal, State, or local public recreation developments; and (c) project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes unless such areas or facilities are included or proposed for inclusion within a national recreation area, or are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife.

SEC. 2. (a) If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to either or both of said purposes, as the case may be, and all the costs of operation, maintenance, and replacement incurred therefor--

\*Approved July 9, 1965 (Public Law 89-72; 79 Stat. 213).



(1) the benefits of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;

(2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: Provided, That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits of reasonably equivalent use and location by the least costly alternative means; and

(3) not more than one-half the separable costs and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be nonreimbursable.

Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

(b) The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by non-Federal interest, under either or both of the following methods as may be determined appropriate by the head of the Federal agency having jurisdiction over the project: (1) payment, or provision of lands, interests therein, or facilities for the project; or (2) repayment, with interest as a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of project recreation or fish and wildlife enhancement facilities: Provided, That the source of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years.

SEC. 3. (a) No facilities or project modifications which will furnish recreation or fish and wildlife enhancement benefits shall be provided in the absence of the indication of intent with respect thereto specified in subsection 2(a) of this Act unless (1) such facilities or modifications serve other project purposes and are justified thereby without regard to such incidental recreation or fish and wildlife enhancement benefits as they may have or (2) they are minimum facilities

which are required for the public health and safety and are located at access points provided by roads existing at the time of project construction or constructed for the administration and management of the project. Calculation of the recreation and fish and wildlife enhancement benefits in any such case shall be based on the number of visitor-days anticipated in the absence of recreation and fish and wildlife enhancement facilities or modifications except as hereinbefore provided and on the value per visitor-day of the project without such facilities or modifications. Project costs allocated to recreation and fish and wildlife enhancement on this basis shall be nonreimbursable.

(b) Notwithstanding the absence of an indication of intent as specified in subsection 2(a), lands may be provided in connection with project construction to preserve the recreation and fish and wildlife enhancement potential of the project:

(1) If non-Federal public bodies execute an agreement within ten years after initial operation of the project (which agreement shall provide that the non-Federal public bodies will administer project land and water areas for recreation or fish and wildlife enhancement or both pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and will bear not less than one-half the costs of lands, facilities, and project modifications provided for either or both of those purposes, as the case may be, and all costs of operation, maintenance, and replacement attributable thereto), the remainder of the costs of lands, facilities, and project modifications provided pursuant to this paragraph shall be nonreimbursable. Such agreement and subsequent development, however, shall not be the basis for any reallocation of joint costs of the project to recreation or fish and wildlife enhancement.

(2) If, within ten years after initial operation of the project, there is not an executed agreement as specified in paragraph (1) of this subsection, the head of the agency having jurisdiction over the project may utilize the lands for any lawful purpose within the jurisdiction of his agency, or may offer the land for sale to its immediate prior owner or his immediate heirs at its appraised fair market value as approved by the head of the agency at the time of offer or, if a firm agreement by said owner or his immediate heirs is not executed within ninety days of the date of the offer, may transfer custody of the lands to another Federal agency for use for any lawful purpose within the jurisdiction of that agency, or may lease the lands to a non-Federal public

body, or may transfer the lands to the Administrator of General Services for disposition in accordance with the surplus property laws of the United States. In no case shall the lands be used or made available for use for any purpose in conflict with the purposes for which the project was constructed, and in every case except that of an offer to purchase made, as hereinbefore provided, by the prior owner or his heirs preference shall be given to uses which will preserve and promote the recreation and fish and wildlife enhancement potential of the project or, in the absence thereof, will not detract from that potential.

SEC. 4. At projects, the construction of which has commenced or been completed as of the effective date of this Act, where non-Federal public bodies agree to administer project land and water areas for recreation and fish and wildlife enhancement purposes and to bear the costs of operation, maintenance, and replacement of existing facilities serving those purposes, such facilities and appropriate project lands may be leased to non-Federal public bodies.

SEC. 5. Nothing herein shall be construed as preventing or discouraging postauthorization development of any project for recreation or fish and wildlife enhancement or both by non-Federal public bodies pursuant to agreement with the head of the Federal agency having jurisdiction over the project. Such development shall not be the basis for any allocation or reallocation of project costs to recreation or fish and wildlife enhancement.

SEC. 6. (a) The views of the Secretary of the Interior developed in accordance with section 3 of the Act of May 28, 1963 (77 Stat. 49), with respect to the outdoor recreation aspects shall be set forth in any report of any project or appropriate unit thereof within the purview of this Act. Such views shall include a report on the extent to which the proposed recreation and fish and wildlife development conforms to and is in accord with the State comprehensive plan developed pursuant to subsection 5(d) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897).

(b) The first proviso of subsection 2(d) of the Act of August 12, 1958 (72 Stat. 563: 16 U.S.C. 662(d)), is amended to read as follows: "Provided, That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for (1) land acquisition, (2) facilities as specifically recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities." The second proviso of subsection 2(d) of said Act is hereby repealed.

(c) Expenditures for lands or interests in lands hereafter acquired by project construction agencies for the establishment of migratory waterfowl refuges recommended by the Secretary of the Interior at Federal water resource projects, when such lands or interests in lands would not have been acquired but for the establishment of a migratory waterfowl refuge at the project, shall not exceed \$28,000,000: Provided, That the aforementioned expenditure limitation in this subsection shall not apply to the costs of mitigating damages to migratory waterfowl caused by such water resource project.

(d) This Act shall not apply to the Tennessee Valley Authority, nor to projects constructed under authority of the Small Reclamation Projects Act, as amended, or under authority of the Watershed Protection and Flood Prevention Act, as amended.

(e) Sections 2, 3, 4, and 5 of this Act shall not apply to non-reservoir local flood control projects, beach erosion control projects, small boat harbor projects, hurricane protection projects, or to project areas or facilities authorized by law for inclusion within a national recreation area or appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife.

(f) As used in this Act, the term "nonreimbursable" shall not be construed to prohibit the imposition of entrance, admission, and other recreation user fees or charges.

(g) Subsection 6(a)(2) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897) shall not apply to costs allocated to recreation and fish and wildlife enhancement which are borne by the United States as a nonreimbursable project cost pursuant to subsection 2(a) or subsection 3(b)(1) of this Act.

(h) All payments and repayment by non-Federal public bodies under the provisions of this Act shall be deposited in the Treasury as miscellaneous receipts, and revenue from the conveyance by deed, lease, or otherwise, of lands under subsection 3(b)(2) of this Act shall be deposited in the Land and Water Conservation Fund Act.

SEC. 7. (a) The Secretary is authorized in conjunction with any reservoir heretofore constructed by him pursuant to the Federal reclamation laws or any reservoir which is otherwise under his control, except reservoirs within national wildlife refuges, to investigate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation and fish and wildlife

enhancement facilities, to acquire or otherwise make available such adjacent lands or interests therein as are necessary for public outdoor recreation or fish and wildlife use, and to provide for public use and enjoyment of project lands, facilities, and water areas in a manner coordinated with the other project purposes: Provided, That not more than \$100,000 shall be available to carry out the provisions of this subsection at any one reservoir, lands, facilities and project modifications for the purposes of this subsection may be provided only after an agreement in accordance with subsection 3(b) of this Act has been executed.

(b) The Secretary of the Interior is authorized to enter into agreements with Federal agencies or State or local public bodies for the administration of project land and water areas and the operation, maintenance, and replacement of facilities and to transfer project lands or facilities to Federal agencies or State or local public bodies by lease agreement or exchange upon such terms and conditions as will best promote the development and operation of such lands or facilities in the public interest for recreation and fish and wildlife enhancement purposes.

(c) No lands under the jurisdiction of any other Federal agency may be included for or devoted to recreation or fish and wildlife purposes under the authority of this section without the consent of the head of such agency; and the head of any such agency is authorized to transfer any such lands to the jurisdiction of the Secretary of the Interior for purposes of this section. The Secretary of the Interior is authorized to transfer jurisdiction over project lands within or adjacent to the exterior boundaries of national forests and facilities thereon to the Secretary of Agriculture for recreation and other national forest system purposes; and such transfer shall be made in each case in which the project reservoir area is located wholly within the exterior boundaries of a national forest unless the Secretaries of Agriculture and Interior jointly determine otherwise. Where any project lands are transferred hereunder to the jurisdiction of the Secretary of Agriculture, the lands involved shall become national forest lands: Provided, That the lands and waters within the flow lines of any reservoir or otherwise needed or used for the operation of the project for other purposes shall continue to be administered by the Secretary of the Interior to the extent he determines to be necessary for such operation. Nothing herein shall limit the authority of the Secretary of the Interior granted by existing provisions of law relating to recreation or fish and wildlife development in connection with water resource projects or to disposition of public lands for such purposes.

SEC. 8. Effective on and after July 1, 1966, neither the Secretary of the Interior nor any bureau nor any person acting under his authority shall engage in the preparation of any feasibility report under reclamation law with respect to any water resource project unless the preparation of such feasibility report has been specifically authorized by law, any other provision of law to the contrary notwithstanding.

SEC. 9. Nothing contained in this Act shall be taken to authorize or to sanction the construction under the Federal reclamation laws or under any Rivers and Harbors or Flood Control Act of any project in which the sum of the allocations to recreation and fish and wildlife enhancement exceeds the sum of the allocations to irrigation, hydro-electric power, municipal, domestic and industrial water supply, navigation, and flood control, except that this section shall not apply to any such project for the enhancement of anadromous fisheries, shrimp, or for the conservation of migratory birds protected by treaty, when each of the other functions of such a project has, of itself, a favorable benefit-cost ratio.

SEC. 10. As used in this Act:

(a) The term "project" shall mean a project or any appropriate unit thereof.

(b) The term "separable costs," as applied to any project purpose, means the difference between the capital cost of the entire multiple-purpose project and the capital cost of the project with the purpose omitted.

(c) The term "joint costs" means the difference between the capital cost of the entire multiple-purpose project and the sum of the separable costs for all project purposes.

(d) The term "feasibility report" shall mean any report of the scope required by the Congress when formally considered authorization of the project of which the report treats.

(e) The term "capital cost" includes interest during construction wherever appropriate.

SEC. 11. Section 2, subsection (a) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897) is hereby amended by striking out the words "notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury:" and inserting in lieu thereof the words "notwithstanding any other provision of law:" and by striking out the words "or any provision of law that provides that any fees or charges collected at particular Federal areas shall be used for or credited to specific purposes or special funds as authorized by that provision of law" and inserting in lieu

thereof "or affect any contract heretofore entered into by the United States that provides that such revenues collected at particular Federal areas shall be credited to specific purposes".

SEC. 12. This Act may be cited as the "Federal Water Project Recreation Act".

## APPENDIX D

### Selected Sections of Watershed Protection and Flood Prevention Act (P.L. 566, 1954 as amended by P.L. 85-624, 1958)

SEC. 3. The Watershed Protection and Flood Prevention Act, as amended (16 U.S.C. secs. 1001-1007, inclusive), is amended by adding at the end thereof the following new section:

"SEC. 12. When the Secretary approves the furnishing of assistance to a local organization in preparing a plan for works of improvement as provided for in section 3:

"(1) The Secretary shall so notify the Secretary of the Interior in order that the latter, as he desires, may make surveys and investigations and prepare a report with recommendations concerning the conservation and development of wildlife resources and participate, under arrangements satisfactory to the Secretary of Agriculture, in the preparation of a plan for works of improvement that is acceptable to the local organization and the Secretary of Agriculture.

"(2) Full consideration shall be given to the recommendations contained in any such report of the Secretary of the Interior as he may submit to the Secretary of Agriculture prior to the time the local organization and the Secretary of Agriculture have agreed on a plan for works of improvement. The plan shall include such of the technically and economically feasible works of improvement for wildlife purposes recommended in the report by the Secretary of the Interior as are acceptable to, and agreed to by, the local organization and the Secretary of Agriculture, and such report of the Secretary of the Interior, accompany the plan for works of improvement when it is submitted to the Secretary of Agriculture for approval or transmitted to the Congress through the President.

"(3) The cost of making surveys and investigations and of preparing reports concerning the conservation and development of wildlife resources shall be borne by the Secretary of the Interior out of funds appropriated to his Department."

SEC. 4. There is authorized to be appropriated and expended such funds as may be necessary to carry out the purposes of this Act.

Approved August 12, 1958.



## APPENDIX E

### Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act

#### 40 CFR Part 1508.20 Mitigation (definition)

" 'Mitigation' includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree of magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments."

As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally owned public lands and natural resources. This includes fostering the wisest use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historical places, and providing for the enjoyment of life through outdoor recreation. The Department assesses our energy and mineral resources and works to assure that their development is in the best interests of all our people. The Department also has a major responsibility for American Indian reservation communities and for people who live in island territories under U.S. administration.

